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IN THE

Supreme Court of the United States

OCTOBER TERM 1944

No. 1003

WINTHROP TAYLOR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT AND SUPPORTING BRIEF

WALTER R. KUHN,
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February, 1945.



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*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petitioner respectfully prays that a writ of certiorari issue to review the decision and order of the Circuit Court of Appeals for the Second Circuit in the above-entitled case entered December 26, 1944, denying the petition herein to review and set aside a judgment of the Circuit Court of Appeals for the Second Circuit. No opinion was rendered by the Circuit Court of Appeals in denying the petition.

A transcript of the record of the case, including the proceedings in the Circuit Court, is furnished herewith in accordance with Rule 38 of this Court.

Jurisdiction

The statute under which jurisdiction is invoked is Section 347 (Judicial Code, 28 U. S. C., Section 240, Amended) (a).

Summary Statement of the Matter Involved

The decision of the Circuit Court of Appeals which this Court is asked to review is in a proceeding in equity based upon a petition, affidavit and exhibits filed pursuant to the authority of the decision of this Court in *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 322 U. S. 235. The petition requested the Circuit Court (C. C. A., 2nd) to review and set aside its judgment affirming a deficiency assessment of personal income tax for the year 1929. The judgment was entered April 22, 1935. The opinion of the Circuit Court is reported in *Taylor v. Commissioner*, 76 F. 2d, 904.

The deficiency assessment was based upon the *exclusive* determination of the Commissioner of Internal Revenue that, because of the large volume of sales of stocks in the panic months of October-November, 1929, the petitioner was considered to be a dealer in securities and hence was not entitled to the benefit of the capital gain rate of $12\frac{1}{2}\%$ on profits realized from the sale of Public Service Corporation shares which the petitioner had acquired and held for more than two years prior to sale (p. 34, Ex. C, at p. 2). Other than this determination by the Commissioner, the petitioner's tax return for 1929, as the result of examination and verification, was found to be in all respects correct except for the allowance of a small *overassessment* (p. 32, Ex. B). In other words while *both the Commissioner and the petitioner have always been in agreement with respect to the amount of the petitioner's net taxable income for 1929*, the Commissioner took the position that it should all be treated as ordinary income and not capital gain because of the large volume of sales, as above stated.

From this determination of the Commissioner the petitioner appealed to the Board of Tax Appeals. At the hearing before the Board the petitioner (and for the first time) was asked to prove that he had not sold Public Service shares prior to October, 1929, on the theory that under "first in-first out" had he done so such sales would have disposed of or "eaten up" the early purchased shares before the running of the two year holding period, leaving no (or less) capital asset shares for sale in October-November, 1929. Although not part of the Commissioner's determination from which the appeal was taken, petitioner accepted this additional burden and testified, without contradiction, that there had been no such prior sales. While the Board found that Public Service shares held for more than two years, i.e., capital asset shares, had been sold and a capital gain realized, the Board affirmed the determination of the Commissioner that based upon the volume of the stock transactions petitioner was a dealer in securities—and despite the uncontradicted evidence that the petitioner was an active practicing lawyer. No evidence was offered by the Commissioner and no real factual dispute was involved. Upon the question of law as to whether the petitioner could be deemed a dealer in securities solely because of the volume of sales, the petitioner appealed to the Circuit Court of Appeals for the Second Circuit.

The Circuit Court reversed the Board with respect to the nature of the petitioner's business or profession and found that he was entitled to claim a capital gain and be taxed accordingly. With respect, however, to whether the petitioner had sold Public Service shares, acquired and held for more than two years prior to sale, the Circuit Court rendered a tangent and unrelated decision holding that because of a lack of certain evidence respecting *other sales* of Public Service shares in October-November, 1929, which had been held for less than two years, the matter had been (to quote the language of the Circuit Court's opinion) "left in the air" and, "unsatisfactory" as it was,

affirmed *on this wholly negative basis* the deficiency assessment. In so doing the Circuit Court made a palpable and fundamental error apparent on the face of its opinion, it appearing therefrom as a mathematical certainty that the petitioner had sold many thousands of Public Service shares acquired and held for more than two years prior to sale from which he realized a large capital gain. (*In fact the petitioner's net taxable income for 1929 consisted exclusively of capital gain [pp. 90, 91].*) The error of the Circuit Court, the gross injustice of the judgment and the circumstances with respect to the lack of evidence are set forth in the petition and affidavit including the additional evidence of the "other sales" which completely confirm the error made by the Circuit Court and which, had it been before the Court, would doubtless have resulted in a judgment in favor of the petitioner.

No material fact is in dispute and the gross injustice of the judgment sought to be set aside is conceded by the respondent. The petition sets forth in detail the payment in full by the petitioner of income tax for 1929 at the capital gain rate of 12½%, with interest, amounting to \$69,540.83 upon a taxable income *consisting exclusively of a net capital gain,—agreed to be \$538,011.74 (pp. 15, 26, 27, 90, 91; Exhibits B and C, pp. 32-34,—the additional deficiency tax, with interest, amounting to over \$100,000 having been assessed on the admittedly and clearly erroneous basis that said capital gain constituted ordinary income subject to tax at normal and surtax rates.*

The petition shows that after the entry of the judgment the petitioner marshalled all pertinent data and submitted it in conjunction with the opinion of the Circuit Court to the Commissioner of Internal Revenue to convince him of the error which had been made so that the gross injustice might be rectified. This involved a long period of effort in the various departments of the Bureau following the discovery of lost records. As a result the Commissioner conceded the grievous error that had been made, but finally, on October 17, 1944, concluded that he had no

authority under Section 3761 of the Internal Revenue Code as construed by the Attorney General of the United States to correct the error, and advised the petitioner accordingly (pp. 14, 15, 16, 26, 27, 28). Meanwhile (on May 15, 1944) this Court decided the *Hazel-Atlas Glass Company* case (*supra*), clarifying the power and duty of the Circuit Court in an equitable proceeding to correct, no matter how belatedly, grossly unjust judgments, and pursuant to such authority the petitioner instituted this proceeding.

The answer of the respondent does not deny or qualify the averments of the petition. Counsel for respondent, however, challenged the power of the Circuit Court to review and set aside its judgment, citing *R. Simpson & Co. v. Commissioner*, 321 U. S. 225, and *Monjar v. Commissioner*, 140 F. 2d, 263 (C. C. A., 2d). The answer also states that the *Hazel-Atlas Glass Company* case (*supra*), relied upon by the petitioner, is not applicable since fraud is not involved (Respondent's Answer—Appendix, p. 17).

Questions Presented

(1) (a) Does the decision of the Supreme Court in the *Simpson* case exclude taxpayers (after a judgment has become "final" under Section 1140 of the Internal Revenue Code) from instituting proceedings in equity to review and set aside upon recognized equitable grounds manifestly unconscionable judgments,—and even when the material facts are not in dispute and the gross injustice is conceded?

(b) Did the Supreme Court by its decision in the *Simpson* case exclude concededly grossly unjust judgments involving taxpayers from the application of the principles and procedure approved by it in the *Hazel-Atlas Glass Company* case?

(2) The decision of the Second Circuit Court in the case of *Monjar v. Commissioner* (*supra*) (followed by the Cir-

euit Court in denying the petition herein) is in conflict with the decision of the Fifth Circuit Court in the case of *Buttengenbach v. Commissioner*, 63 F. 2d, 630. Which Circuit is right?

(3) There being no dispute as to the material facts, the error being apparent and the gross injustice of the judgment sought to be set aside being conceded, was it not the duty of the Circuit Court (under the decision of the *Hazel-Atlas Glass Company* case) to set aside the judgment though fraud is not involved?

(4) Where a fundamental error is apparent on the face of the opinion of the Circuit Court due to mistake, unmixed with negligence on the part of the petitioner, resulting in a concededly grossly unjust tax judgment, the injustice of which is confirmed by newly discovered evidence which, through no lack of diligence on the part of the petitioner, was not before the Court, and there is no dispute as to the material facts, is it not the duty of the Circuit Court to set aside the judgment?

Reasons Relied On for Allowance of the Writ

(1) (a) The decision of the Circuit Court denying the petition under the authority of the *Simpson* case bars taxpayers, with respect to judgments which have become "final" under Section 1140 of the Internal Revenue Code, from instituting proceedings in equity to set aside such judgments although the material facts are not disputed and the gross injustice of the judgment is conceded. This constitutes an important jurisdictional question of Federal tax law which has not been but should be settled by this Court in the public interest.

(b) The decision of the Circuit Court in denying the petition excludes judgments affecting taxpayers from the application of the principles and procedure approved by this

Court in the *Hazel-Atlas Glass Company* case. This involves an important question of Federal tax law which has not been but should be settled by this Court in the public interest.

(2) The decision of the Second Circuit Court in the *Monjar* case (followed by its decision denying the petition herein) is in conflict with the decision of the Fifth Circuit Court on the same matter. To make for uniformity of decision, this conflict should be resolved by this Court.

(3) The error of the Circuit Court in the tax proceeding being apparent on the face of its opinion and a fundamental mistake having been made unmixed with negligence on the part of the petitioner resulting in a *concededly* grossly unjust judgment, and there being no dispute as to the material facts, the decision of the Circuit Court refusing to set aside the judgment is probably in conflict with applicable decisions of this Court,—and particularly the decision in the *Hazel-Atlas Glass Company* case.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the United States Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court.

WALTER R. KUHN,
Counsel for Petitioner.

February, 1945.